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Supreme Court of the United States

OCTOBER TERM, 1961.

No. 818.

UNITED STATES LINES COMPANY and
SS. *AMERICAN HARVESTER*,

Petitioners,

against

EMANUEL VAN CARPALS,

Respondent.

PETITION FOR REHEARING.

THOMAS COYNE
AND
CHARLES N. FIDDLER
Counsel for Petitioners.
120 Broadway,
New York 5, N. Y.

ROBERT P. HART.
Of Counsel.

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United States Lines Company and the SS. *American Harvester* respectfully present this petition for a rehearing of its petition for a writ of certiorari (which was denied on April 30, 1962) for the following reasons:

FIRST.

This suit is one for injuries sustained by the libellant, a shipyard worker, while removing a valve from the port boiler of the SS. *American Harvester* pursuant to a contract with his employer, Todd Shipyards Corporation, while the vessel was undergoing the statutory inspection required by law.

Although the trier of the facts found that he was furnished a vessel and appurtenances reasonably fit for his use, the Court of Appeals reversed the dismissal of the libel and directed a recovery by him on the ground that the

vessel was unseaworthy as a matter of law, stating, among other things:

> "• • • Though the cause of the accident may be inexplicable, yet it, and the way it occurred, demonstrated that the valve was actually not in a safe condition for the work needed to be done upon it."

Although it would seem clear from *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550, that a claimant must prove that the appliance was not in a *reasonably* safe condition, the Court of Appeals in reversing the trial judge's holding, as a matter of law, ignored this requirement. Instead, it concluded that the valve was not "in a safe condition". The *Mitchell* case emphasizes reasonableness in the conclusion of the majority opinion three times. The duty is said to be only to furnish appurtenances "reasonably fit for their intended use"; the standard is "reasonable fitness" and the vessel need only be "reasonably suitable for her intended service".

Can it be said that the Court of Appeals applied this standard when it scuttled the trial judge's holding of reasonableness and allowed a recovery by concluding as a matter of law that the appurtenance was "not in a safe condition for the work"?

If this Court does not review the aforesaid holding by the Court of Appeals we are left in the dark as to what the real standard is.

1. Must the appliance be in a safe condition, *period?*

2. Must the appliance be in an absolutely safe condition?

or

3. Is it essential for a recovery that the appliance be shown not to be in a *reasonably* safe condition?

SECOND.

It would seem evident the libellant had the burden of proof to show that the vessel was unseaworthy with respect to the work he was performing, and, as the Court of Appeals for the 9th Circuit in *Partenweederei, MS Belgrano* v. *Weigel*, 299 F. 2d 897, held, a shoreside worker also has the burden of showing that he is entitled to the protection of the unseaworthiness doctrine afforded a real seaman, i.e., a member of the crew.

Yet in opposing the petition for certiorari he nowhere referred to the contract under which he was working. Perhaps the court may have been misled into believing that the contract required no testing, even though the libellant himself admitted in effect that he relied upon no warranty of seaworthiness because he himself tested to see if steam or hot water came out of the valve.

As this Court held in *West* v. *United States*, 361 U. S. 118, at page 123, the owner of a vessel has no duty to protect the employee of an independent contractor from the risks inherent in carrying out the contract, and when the contract provides for testing it is the nature of the contract and not the particular segment of work performed by the employee that controls the nature of the work in which he is engaged. The testing of the port boiler from which the valve was being removed, was required by the contract which included such testing in the following provision of the contract:

> "8. *Port Boiler (Internal Desuperheater Connection (E)* Fabricate one (1) bent and offset internal desuperheater connection as per blueprint. Install and weld flange to each end. Rig test gear and test each connection to 800 lbs. and prove tight. Remove test gear. Install and weld doubler in way

of water level around desuperheater connection. Transport connection to vessel. Disconnect and remove present deteriorated desuperheater connection from boiler. Fit and install new connection in place with high pressure gaskets and nuts. Test and prove tight. 305.00"

It would be virtually impossible for the Coast Guard to make the inspection alone. The respondent in his answering brief admitted that he was "helping the Coast Guard make the inspection". Counsel for the respondent should know that the Coast Guard relies upon a certificate furnished by the American Bureau of Shipping of a survey made after the shipyard has complied with its contract, in carrying out the statutory duty of the petitioners.

THIRD.

As pointed out in the petition, there is a continuing controversy between the writer of the opinion of the Court of Appeals in this case and other judges of the Court of Appeals of the Second Circuit with respect to the extent of a ship's liability for unseaworthiness.

The decision which petitioner requests this Court to review has since been cited as supporting a rule of absolute liability, which in effect holds that an accident aboard a ship makes the vessel unseaworthy even though in the view of the testifying experts the valve was faultless, and that a recovery is required for every accident aboard a ship which results from "some failure in the ship's operation".

Thus, in the case of *Antonio Nuzzo v. Rederi, A/S Wallenco, Stockholm, Sweden*, decided by the Court of Appeals, Second Circuit, May 14th, 1962, and not yet reported (No. 48 September Term, 1961, Docket No. 26992),

the opinion writer in dissenting cited his decision in this case at several places, including the use of the emotion packed non-existing and withdrawn reference to the "explosion" of a valve. At page 1809 of the slip opinion he expresses his views in terms of "absolute liability" in making the following statement:

> " • • • Liability seems as clear, for instance, as in the case of the unexplained exploding of a valve where we recently reversed a finding excusing the ship from liability. *Van Carpals* v. *S. S. American Harvester*, 2 Cir., 297 F. 2d 9, certiorari denied *U. S. Lines Co.* v. *Van Carpals*, April 30, 1962.
>
> But the opinion of the majority overruling the findings below appears to reintroduce negligence concepts into the law of unseaworthiness, and thus to overthrow, by a kind of covert counterrebellion, the rule of *absolute liability* laid down in *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, and *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, and recently reaffirmed in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539." (Italics supplied.)

At page 1810 of the slip opinion he discloses that in the case at bar he rejected the view of reasonableness in the face of the contrary holding by the trier of the facts in the following statement:

> "• • • This seems a new departure; in *Van Carpals*, for instance, we did not hold ourselves bound by the industry view that the erupting valve was faultless."

Reference was made in the petition for a writ of certiorari to the intra-Circuit controversy disclosed in *Puddu* v. *Royal Netherlands Steamship Company*, decided January 3, 1962 (petition for rehearing *in banc*, denied

on February 20, 1962) which has not yet been reported in the Federal Reports but which is now reported in 1962 American Maritime Cases, 419. In his dissent Judge Clark cited his present decision as authority for the upholding of liability for seaworthiness untrammeled, in effect, by considerations of reasonableness, and disclosed in particular the conflict of this decision with the decisions of the 9th Circuit as to whether the "clearly erroneous" standard applies to questions of unseaworthiness as questions of fact. This *Van Carpals* case, he said, holds that unseaworthiness is a question of law, not one of fact, in the following statement (1962 A. M. C. 424):

> "• • • Moreover, the district judge treated the question of unseaworthiness as one of fact, thus going directly against our rulings that unseaworthiness (like negligence) is a question of law. *Van Carpals* vs. *S.S. American Harvester, supra* (2 Cir., Jan. 10, 1962), 1962 A. M. C. 395 (rehearing denied); *Krey* v. *United States,* (2 Cir.), 1942 A. M. C. 19, 123 F. (2d) 1008. *Cf. Romero* vs. *Garcia & Diaz, Inc.* (2 Cir.), 1961 A. M. C. 592, 286 F. (2d) 347, 355, certiorari denied 365 U. S. 869, 1961 A. M. C. 1924."

The most recently reported 9th Circuit case restricting liability for unseaworthiness to fact is *Licberman* v. *Matson Navigation Company,* 300 F. 2d 661.

Since the filing of the petition for certiorari, the Court of Appeals reconsidered the denial, in the *Puddu* case, of the petition for a rehearing *in banc* and, after full re-consideration, by a decision made May 15, 1962, not yet reported, six judges adopted the original majority opinion of January 3, 1962, as the opinion of the *in banc* court, one judge concurred in a separate opinion and two judges dissented in separate opinions. Contrary to Judge Clark's

statement in the *Nuzzo* case, *supra*, Judge Hays (page 1823 of the Puddu slip opinion) states in his concurring opinion that "there is no case which holds that there is absolute liability".

In Judge Clark's dissent from the May 15, 1962 *Puddu* decision he wonders "why *in banc* consideration was ever granted" in view of the summary disposition of the case, and on page 1824 of the slip opinion he recognizes that the Court of Appeals for the Second Circuit has held that the trier of the facts "must determine in each case whether the duration of a hazard is such as to render the ship unseaworthy", although he disagreed with that holding in *Pinto* v. *States Marine Corp. of Delaware*, 296 F. 2d 1. Thus, he complains, at page 1824, that:

> "* * * . . . we have held that the trier of the facts must determine in each case whether the duration of a hazard is such as to render the ship unseaworthy. *Pinto* v. *States Marine Corp. of Delaware*, 2 Cir., 296 F. 2d 1, certiorari denied 82 S. Ct. 874. Yet no such consideration was made here."

The last sentence of that phrase is also applicable to this case for "no such consideration was made here", either. In overruling the trial judge and holding the vessel unseaworthy as a matter of law, Judge Clark made no consideration as to the duration of a hazard. Surely the aforesaid controversy as to the meaning of unseaworthiness and the confusing interpretations of this Court's decisions as to the meaning of reasonableness in this suit and in other law suits should prompt this Court to re-consider its determination and grant review of the decision below, particularly in view of the conflict with the Ninth Circuit as to whether unseaworthiness is a question of law or a question of fact.

FOURTH.

Since the service of the petition for a writ of certiorari the Committee on Merchant Marine and Fisheries of the House of Representatives, reported out, H. R. 207, on March 27, 1962, 87th Congress, 2nd Session, Report No. 1515, a bill "Restricting the Liability of Vessel Owners and Others in Suits Based Upon the Warranty of Seaworthiness", which restricts such a warranty to actual members of the crew of a vessel. The Bill provides as follows:

> "That in any action upon a claim arising under admiralty and maritime law against any ship or vessel of any type, or its owner, agent, or charterer for damages for personal injury to or death of any person, other than a member of the crew of the ship or vessel on which injury occurs, as a result of acts or omissions of the owner, agent or charterer or any of his officers, agents, servants, employees, contractors, or any crew member of the ship or vessel, or the condition of the ship or vessel, liability of the ship or vessel or its owner, agent, or charterer shall be determined without respect to and shall not in any such case be based upon any warranty of seaworthiness or breach thereof."

Even counsel representing organizations opposing the bill did not go as far as the Court of Appeals in stating the measure of safety required for the breach of warrant of seaworthiness. At page 159 of the Reported Hearings of February 20-21, 1962, Mr. Abraham E. Freedman, stated that the ship or equipment should be "reasonably safe under the circumstances".

On the other hand, a layman (a union official) testified at page 208, that the doctrine requires the shipowner "to provide an absolutely safe working place", and, again,

at page 210, that a shipowner must "insure that there are no unsafe working conditions" and "that the liability of the shipowner should be absolute".

Surely, this Court should answer these conflicting and confusing views by reviewing the absolute liability holding in this case.

In *West* v. *United States*, 361 U. S. 118, the Court noted that the sole purpose of the work being done in that case (as in this case) was to make the vessel seaworthy. At page 121 it points out that certain workmen depend upon the seaworthiness of a ship's equipment and gear, but (as in this case) stated that "no such situation is present here".

As in this case, it would be an unfair contradiction to say that the owner held the vessel out as seaworthy. The very nature of the work in this case was to determine the seaworthiness of the ship's boilers by a workman who obviously did not rely upon a warranty but tested the valve to see if steam would come out. Whether it was a personal habit or not, surely the very work here created the hazard, steam coming out of boiler being subjected to a statutory inspection for seaworthiness.

This Court created, in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, a form of social legislation for "humanitarian reasons" in a field in which Congress had already legislated when it granted workmen's compensation to shoreside workers. Although the gravamen of that decision was that the shipowner could not be "free" to nullify its liability by *parcelling out* to others work previously done by members of the crew for the advantages of modern divisions of labor, this Court has thus far avoided dealing with the extent of the "parcelling out" required to impose the liability created by *Sieracki*. When, as in this case, the

shipowner has no choice in "parcelling out" the work required for the rigid requirements of the American Bureau of Shipping certificate for the statutory inspection the shipowner is not "free".

In *West* v. *United States, supra*, and *Roper* v. *United States*, 368 U. S. 20, the court escaped the problem of determining whether specific work was subject to the unseaworthiness doctrine by holding that nobody on the vessel could be considered a quasi member-of-the-crew because nobody on a vessel removed from navigation could be considered a member of the crew.

Although this Court, in *United Pilots Assn.* v. *Halecki*, 358 U. S. 613, appeared to have decided the matter on the question of "work previously done by members of the crew", the decision turned in part on the fact that no members of the crew were present on the vessel while its equipment was being cleaned with carbon tetrachloride.

In view of the foregoing proposed legislation it would seem that this Court should exercise its function to interpret its judge made law by considering in this classic case and in other such cases not only the limits for liability for seaworthiness but the particular type of shoreside worker excluded from its application, without the crutch of whether or not the vessel is or is not out of navigation or whether any members of the crew are present.

A review of this case would clarify the question, and when further action is taken on H. R. 207, the legislators can ascertain whether the doctrine of unseaworthiness requires appliances to be reasonably safe, safe (*period*), or absolutely safe, and also the type of work and persons included in its perimeter.

Conclusion.

It is respectfully requested that the Court reconsider its denial of the petition for a writ of certiorari and grant such petition.

Dated: May 21, 1962.

Respectfully Submitted,

Thomas Coyne
and
Charles N. Fiddler
Counsel for Petitioners.

Robert P. Hart,
Of Counsel.

Certificate.

I, Charles N. Fiddler, counsel for the petitioners, do hereby certify that the foregoing petition for the rehearing is presented in good faith, and not for delay, and is restricted to the grounds above specified.

Charles N. Fiddler
Counsel for Petitioners.